UNION OIL COMPANY OF CALIFORNIA ET AL.

IBLA 86-292, 86-398, 86-430 Decided May 5, 1988
86-929, 86-1233

Appeals from decisions of the Oregon State Office, Bureau of Land Management, offering noncompetitive geothermal leases with conditional no surface occupancy stipulations. OR 37997 et al.

Affirmed.

1. Geothermal Leases: Environmental Protection: Generally--National Environmental Policy Act of 1969: Environmental Statements

When BLM has adopted a staged leasing program and notifies a potential geothermal lessee that all post- lease plans for exploration and development are sub- ject to site-specific environmental review, and that development might be limited or denied if such review discloses that unacceptable impacts on other land uses or resources would result, it is not necessary to prepare an environmental impact statement prior to leasing.

APPEARANCES: Chiye R. Wenkam, Esq., Los Angeles, California, for Union Oil Company of California; C. R. Williams, Lakewood, Colorado, for Sunoco Energy Development Company; David N. Larsen, Portland, Oregon, for Portland General Electric Company; C. Girard Davidson, Portland, Oregon, for Sylvia A. Davidson, Charlotte W. Hook, and Alaska Pacific Oregon Ltd.; Donald P. Lawton, Esq., Associate Regional Solicitor, Pacific Northwest Region, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Union Oil Company of California (Union Oil), Alaska Pacific Oregon Ltd. (Alaska Pacific), and Sylvia Davidson have appealed from three deci- sions by the Oregon State Office, Bureau of Land Management (BLM), request- ing that they sign and date "special stipulations" forms, which are to govern seven geothermal resources lease offers for lands in the Deschutes National Forest, Oregon. Sunoco Energy Development Company (Sunoco), Portland General Electric Company (PGE), Sylvia Davidson, and Charlotte Hook have appealed from three BLM decisions offering a series of 23 geothermal resources leases for lands in the Deschutes National Forest, subject to the

same "special stipulations." 1/ Appellants all indicate that they would accept the geothermal resources leases subject to the stipulations set forth on "Exhibit A," which address wildlife and habitat protection, water restrictions, fire control, cultural resources, and archaeological concerns. However, they all object to the special stipulation set forth on "Exhibit B," which we will refer to in this opinion as a conditional no surface occupancy (NSO) stipulation, set forth below:

> The Bureau of Land Management has reviewed existing infor- mation and planning documents and except as noted in attached special stipulations, knows of no reason why normal develop- ment, subject to the controls of applicable laws and regula- tions, and the lease terms and conditions, cannot proceed on the leased lands. However, specific activities could not be considered prior to lease issuance since the nature and extent of the geothermal resource were not known and specific opera- tions have not been proposed. The lessee is hereby made aware that, consistent with 43 CFR 3262.4, all post lease operations will be subject to appropriate environmental review and may be limited or denied, but only if unmitigatable [sic] and unaccept- able impacts on other land uses or resources would result.

In its statement of reasons, Union Oil presents four arguments in sup- port of its position that the NSO stipulation amounts to an "unacceptable condition to the offered leases" (Union Oil's Statement of Reasons (SOR) at 2). 2/ Union Oil's summary of those arguments is set forth below:

1. The need for the BLM stipulation quoted above appears to be based on an overly broad and erroneous interpre- tation of Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Circuit l983). That decision should be limited to lands for which wilderness review or other land manage- ment classification had not been completed.

2. If the BLM stipulation has the effect of implementing staged leasing, then the addition of this stipulation is beyond the authority given to the BLM in the [Geothermal Steam Act of l970, as amended, 30 U.S.C. | 1001 (l982)].

3. Enforcement of the BLM stipulation is a standardless procedure that eliminates lease rights granted pursuant to statute.

1/ Appendix A constitutes a list of the applicants/appellants, IBLA docket numbers, application numbers, and the dates of BLM's decisions.

2/ Sylvia A. Davidson and Charlotte W. Hook (IBLA 86-929), and Alaska Pacific each filed a Statement of Reasons (SOR) adopting the SOR filed by Union Oil. Sunoco and PGE filed identical SOR's which contain arguments similar to those advanced by Union Oil. Davidson and Hook, Sunoco, PGE, and Alaska Pacific all agree that the resolution of their appeals depends upon the Board's disposition of Union Oil's appeal.

4. Under the decision, Sierra Club, Oregon Chapter, 87 IBLA 1 (l985), there is no rational reason for the BLM to retain the right to preclude all surface activities because a Draft Environmental Impact Statement has been prepared for the Deschutes National Forest (Deschutes DEIS) (issued in January l986) and enough other data is available to properly evaluate the impacts of geothermal development. It is arbitrary and capricious for the BLM to offer the leases in question, with the BLM stipu-lation, without an analysis of the DEIS and the other information available to it.

(Union Oil's SOR at 2-3).

Union Oil seeks to distinguish Peterson on the basis that the lands involved therein, located in the Targhee and Bridger Teton National Forests of Idaho and Wyoming, were part of a "Further Planning Area," and were being considered under the Second Roadless Area and Evaluation for possible inclusion as wilderness. Union Oil would limit the application of Peterson to "those lands whose potential wilderness or special values would be lost if development occurred prior to their final classification" (Union Oil's SOR at 5). In Union Oil's opinion, "the Peterson rule should not apply to lands that have been designated as suitable for multiple use." Id.

[1] The National Environmental Policy Act of l969 (NEPA), 43 U.S.C. | 4332(2)(C) (l982), requires preparation of an environmental impact statement (EIS) whenever a major Federal action will significantly affect the quality of the human environment. To determine the nature of the environmental impact from a proposed action and whether an EIS will be required, the agency prepares an environmental assessment (EA). 40 CFR l50l.4(b), (c) (l982). If on the basis of the EA the agency finds that the proposed action will produce "no significant impact," an EIS need not be prepared. 40 CFR 1501.4(e). Based upon the Geothermal Leasing Environmental Assessment Report prepared by the U.S. Forest Service (FS) in l982, and the Department's programmatic EIS addressing geothermal leasing and development dated l973, BLM determined that geothermal leasing in the Deschutes National Forest was categorically excluded from further environ- mental review except for site-specific analysis. This determination reflects BLM's conclusion that issuing geothermal leases subject to cer- tain stipulations would result in "no significant impact" under 40 CFR 1501.4(e). BLM premised this finding of "no significant impact" upon the conclusion that lease stipulations will prevent any significant environ- mental impacts until a site-specific plan for exploration and development is submitted by the lessee. See Sierra Club, Oregon Chapter, 87 IBLA 1, 10 (1985).

Peterson makes clear that the validity of BLM's decision not to prepare an EIS prior to issuing mineral leases depends upon whether there has been an "irreversible, irretrievable commitment of resources." 717 F.2d at l4l2. If BLM has not retained the authority to preclude all surface disturbance activity, then the decision to lease is itself the point of "irreversible, irretrievable commitment of resources" mandating the preparation of an EIS.

Id. The Peterson court divided the leases under consideration into two groups--those which were subject to an NSO stipulation and those which were not. The Sierra Club conceded that "the Department retains the authority to preclude all surface disturbing activities on land leased with a NSO stipulation until further site-specific environmental studies are made." Id. The court agreed that "[b]y retaining this authority, the Department has insured that no significant environmental impacts can occur from the act of leasing lands subject to the NSO stipulation." Id.

However, the court concluded that in issuing leases without retaining the authority to preclude activities which might have unacceptable environ- mental consequences, BLM failed to comply with NEPA. In order to so comply, BLM "must either prepare an EIS * * * or retain the authority to preclude surface disturbing activities until an appropriate environmental analysis is completed." 717 F.2d at 1415. The court reasoned as follows:

> If the Department retains the authority to preclude all surface disturbing activities pending submission of a lessee's site-specific proposal as well as the authority to refuse to approve proposed activities which it determines will have unacceptable environmental impacts, then the Department can defer its environmental evaluation until such site-specific proposals are submitted. If, however, it is unable to preclude activities which might have unacceptable environmental consequences, then the Department cannot issue leases sanctioning such activities without first preparing an EIS. [Emphasis in original.]

Id.

In Conner v. Burford, 836 F.2d 1521 (9th Cir. l988), the U.S. Circuit Court of Appeals for the Ninth Circuit considered, inter alia, whether BLM and the FS violated NEPA by selling oil and gas leases on 1,300,000 acres of national forest land in Montana without preparing an EIS. The court fol-lowed the Peterson approach of dividing the leases into either "NSO leases" or "non-NSO leases," depending upon whether the lease contained an NSO stipulation, and held that "the sale of an NSO lease cannot be considered the go/no go point of commitment at which an EIS is required." Id. at 1529. However, the Ninth Circuit agreed with the Peterson court that the sale of a non-NSO oil or gas lease constitutes the "point of commitment" which trig- gers the requirement for an EIS. The Ninth Circuit's reasoning disposes of appellants' argument that BLM should issue the leases involved in these appeals without an NSO stipulation:

> In sum, the sale of a non-NSO oil or gas lease constitutes the "point of commitment;" after the lease is sold the government no longer has the ability to prohibit potentially significant inroads on the environment. By relinquishing the "no action" alternative without the preparation of an EIS, the government subverts NEPA's goal of insuring that federal agencies infuse in project planning a thorough consideration of environmental values. The "heart" of the EIS - the consideration of reasonable alternatives to the proposed action - requires federal agencies

> to consider seriously the "no action" alternative before approv- ing a project with significant environmental effects. 40 C.F.R. | 1502.l4(d) (l985). That analysis would serve no purpose if at the time the EIS is finally prepared, the option is no longer available. We agree with the District of Columbia Circuit that unless surface-disturbing activities may be absolutely precluded, the government must complete an EIS before it makes an irretriev- able commitment of resources by selling non-NSO leases.

Conner v. Burford, supra at 1531, 1532.

The Board has applied the Peterson decision in a series of cases involving the need for preparation of an EIS prior to the issuance of geothermal leases. E.g., Union Oil Co. of California, 99 IBLA 95 (l987); Sierra Club, The Mono Lake Committee (On Reconsideration), 84 IBLA 175 (l984); and Sierra Club, The Mono Lake Committee, 79 IBLA 240 (l984). In Sierra Club, The Mono Lake Committee, the geothermal lease sale notice contained the NSO stipulation involved in the instant appeal. The Board concluded that it was "not entirely clear whether a lessee would have the right to develop the geothermal resources or whether BLM can deny the lessee the right to develop and use the land if BLM determines that the impacts are environmentally unacceptable." 79 IBLA at 247. Based upon Peterson, Sierra Club v. Hathaway, 579 F.2d ll62 (9th Cir. l978), and County of Suffolk v. Secretary of the Interior, 562 F.2d l368 (2d Cir. l978), the Board stated that BLM's "precluding surface disturbing activities would allow deferral of environmental review, but that only reserving the authority to impose reasonable mitigation measures would not." 79 IBLA at 248. The Board con- cluded: "Thus, because BLM has adopted staged leasing * * * but it has not included a conditional stipulation in its notice to lease and its intent with respect to use and development of a lease is unclear from the record, we must set aside the BLM protest decision and remand the case to allow BLM to clarify its intent with respect to leasing in the Mono-Long Valley KGRA." Id. at 249.

Subsequently, in Sierra Club, The Mono Lake Committee (On Reconsidera- tion), supra, the Board ruled that BLM's intent with regard to leasing in the Mono-Long Valley KGRA is "clear." BLM explained to the Board that its intent regarding postlease development rights is embodied in the "condi- tional development notice" -- what we call the NSO stipulation in the instant cases -- included in the notice of sale. The Board noted Sierra Club's argument that Instruction Memorandum (IM) No. 82-64 and IM No. 82-64, Change 1, contain inconsistent language regarding staged leasing. 3/ How- ever, in the Board's opinion, "[t]he governing language is that in the con- ditional development notice." The Board agreed with BLM that "a potential

3/ In its SOR, Union Oil points to these IM's in arguing that BLM and the FS have taken inconsistent and even conflicting positions with regard to the NSO stipulation. As the Board emphasized in Sierra Club, The Mono Lake Committee (On Reconsideration), the governing language is in the conditional development notice (i.e., the NSO stipulation). We reiterate that the NSO

lessee by submitting a bid agrees to the conditions of sale, such as the conditional development notice." 84 IBLA at 178. The Board's ultimate ruling applies in the instant appeals: "We find that BLM in this case properly provided for conditional development of the lease specifying that development would be limited or denied if site-specific environmental reviews disclosed that unacceptable impacts would result. For that reason, preparation of an environmental impact statement (EIS) prior to leasing is not necessary." Id. at 179.

In Sierra Club, Oregon Chapter, supra, the Board again addressed the question of whether BLM's proposed issuance of noncompetitive geothermal resources leases comported with NEPA. BLM and the FS contended that an EIS was not required prior to leasing because the EA prepared by the FS properly determined that leasing would cause no significant impact on the human environment, and that BLM had provided for "staged leasing by retaining authority to preclude surface-disturbing activities which would result in unacceptable environmental impacts." 87 IBLA at 5. In this decision, the appellant argued, as does Union Oil, that the concept of staged leasing is inconsistent with the Geothermal Steam Act of l970, as amended, 30 U.S.C. | 1001 (l982). The Board concluded that the provisions of the Geothermal Steam Act of l970 are "clear in vesting the discretionary authority with respect to the issuance of geothermal resources leases in the Secretary of the Interior." 87 IBLA at 8. Such "authority includes the ability to set additional terms and conditions of a lease not inconsistent with those prescribed by the Forest Service, including more restrictive stipulations deemed necessary by the Secretary of the Interior to protect environmental or other resources identified by BLM." Id.

Moreover, in Sierra Club, Oregon Chapter, the Board rejected appel- lant's contention that the EA should have addressed the environmental impact of exploration and development in connection with the issuance of geothermal resources leases. Appellants argue in the instant case that sufficient environmental review has already been accomplished through the Deschutes EIS and FS' EA's, and that, accordingly, there is no need for BLM to retain the authority to preclude activities which might result in unacceptable environmental consequences. Accepting this argument would amount to ignoring the rulings in Peterson, Conner, and the cited decisions of this Board, all of which require BLM to retain the authority to preclude such activities.

As established in Peterson, it is precisely because an assessment of the site-specific environmental impacts of geothermal exploration and development may be deferred that BLM must retain the authority to preclude proposed surface-disturbing activities which could result in unacceptable environmental impacts. 717 F.2d at 1415. In Sierra Club, Oregon Chapter,

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fn. 3 (continued)
stipulation must be interpreted and applied in a fashion consistent with Peterson and Conner if BLM is to defer preparation of an EIS or an EA to consider the environmental impacts of development of a geothermal resources lease.

the Board stated that while the proposed leases involved therein were sub- ject to control "so comprehensive that little additional control is actu- ally afforded by staged leasing," BLM had not retained the authority to "totally preclude all surface-disturbing activities within the entire leased area if the environmental impact is determined to be unmitigable and unac- ceptable." 87 IBLA at l5. Accordingly, the Board remanded the case to BLM with instructions to either "prepare an EIS to address the environmental impacts of exploration or development, or in the alternative to institute appropriate staged leasing consistent with the dictates of Peterson and Sierra Club." Id. The Board directed that BLM, if it chose the staged leasing alternative, obtain the consent of the holders of the already issued leases to an additional NSO stipulation, or cancel the lease if such con-sent is not granted.

Finally, this Board recently decided Union Oil Co. of California, supra, in which the appellants objected to leases which incorporate the NSO stipulation. The Board relied upon Sierra Club, Mono Lake Committee (On Reconsideration), in affirming BLM's inclusion of the contested NSO stipu- lation, stating that "[w]hen BLM has properly provided for conditional development of a lease by specifying that development would be limited or denied if site-specific environmental review reveals unacceptable environmental impacts would result from continued activity, the preparation of an EIS prior to lease issuance is unnecessary." 99 IBLA at 97.

We conclude that by use of the NSO stipulation in the proposed leases involved in these appeals, BLM has retained the authority to preclude activities which might have unacceptable environmental consequences, as required by Peterson, Conner, and the above-discussed Board decisions.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.l, the decisions of the Oregon State Office are affirmed. 4/

John H. Kelly
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

4/ Because these appeals do not raise a substantial factual dispute, Union Oil's request for a hearing is denied. See e.g., Union Oil Co. of California, supra; Woods Petroleum Co., 86 IBLA 46 (1985).

APPENDIX A

Applicant/Appellant	IBLA Docket No.	Application No.	BLM Decision Date
Union Oil Co. of California	IBLA 86-292	OR 37997 OR 37998 OR 37999 OR 38058 OR 39076	Jan. 2, 1986
Sunoco Energy Development Company	IBLA 86-398	OR 35390 OR 35391 OR 35392 OR 35393 OR 35394 OR 35395 OR 35396 OR 35397 OR 39398	Jan. 9, 1986
Portland General Electric Company	IBLA 86-430	OR 17057 OR 17060 OR 17061 OR 17063 OR 17064 OR 17066 OR 17067 OR 19011 OR 39012 OR 39013 OR 39014	Feb. 6, 1986
Sylvia A. Davidson, Charlotte W. Hook	IBLA 86-929	OR 33205 OR 33209 OR 32703	Mar. 6, 1986
Sylvia Davidson, Alaska Pacific Oregon Ltd.	IBLA 86-1233	OR 39698 OR 39700	Apr. 21, 1986 Apr. 24, 1986